Date: June 28, 1995
Case No.: 94-INA-00031

In the Matter of:

KLEINFELD BRIDAL SHOP,
Employer

On Behalf of:

RUBY RAMPERIE SEUNARINE,
Alien

Appearance: David Stanton, Esq.
For the Employer

Before: Brenner, Clarke, Guill, Huddleston, Litt, and Williams
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the

responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO granted certification and the Employer's request for review, as contained in an Appeal File,[1] any written argument of the parties, and *amicus curiae* briefs from interested parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On September 14, 1987, Kleinfeld Bridal Shop ("Employer") filed an application for labor certification to enable Ruby Seunarine ("Alien") to fill the position of "Hand Finisher" (AF 43). As required under 20 C.F.R. Part 656.21(a), that application was submitted to the State of New York Department of Labor ("State Agency"). The Employer was notified on October 5, 1990, that it was required to provide certain additional information, that pursuant to 20 C.F.R. § 656.21(h), all responsive documentation had to be submitted within 45 calendar days, that no extensions could be granted, and that failure to fully respond would result in an "automatic loss" of the Employer's filing date (AF 50).[2]

The Employer submitted its response dated October 10, 1990, by certified mail. The Employer heard nothing from the State Agency until it inquired into the matter in January 1992, at which time it was notified that its response had never been received, and therefore, the application had been cancelled (AF 52-53). However, because the Employer's inquiry included documented proof of timely mailing, the State Agency agreed to reopen the case with the original filing date (AF 54).

On February 19, 1992, the State Agency notified the Employer that it was to initiate a 30-day recruitment effort (AF 57-58). A draft of the Employer's proposed advertisement was submitted on March 3, 1992, and approved on March 4, 1992 (AF 80). On April 3, 1992, the State Agency sent the Employer the second of four forms requesting documentation of recruitment and results.[3] According to that form, the Employer was required to submit the following: (1) copies of the advertising placed within the 30-day recruitment period; (2) a copy of the posted notice including number of days or dates posted; and, (3) the Employer's report of results of recruitment (AF 61). The State Agency form included the standard language

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n,*" where *n* represents the page number.

[2] The filing date is relevant in ultimately determining when an alien beneficiary of a permanent labor certification is able to enter the Country to fill the job offer or, if already legally in the Country on a temporary basis, apply for an adjustment of status pursuant to 8 C.F.R. Part 245(a). An alien is assigned a priority date for purposes of obtaining a visa pursuant to 8 U.S.C. § 1153(b) based on the date the application for certification was "accepted for processing by any office within the employment services system of the Department of Labor." 8 C.F.R. Part 245(d).

[3] The first form, dated March 26, 1992, with a reply date of May 11, 1992, requests the same information as the second. It bears a hand notation indicating that it was voided for an unspecified reason (AF 61).

forewarning the Employer that, pursuant to 20 C.F.R. § 656.21(h), a full response was to be returned to the State Agency within 45 calendar days and that failure to comply would result in automatic loss of the Employer's filing date, and requests for extensions of time would not be considered (AF 61). A reply date of May 18, 1992, was listed.

On April 7, 1992, the State Agency sent the Employer the third form letter requesting documentation of recruitment and results. The Employer was advised that enclosed was one response to its recent advertisement for the job and that the Employer was to contact the applicant and return the resume and recruitment report to the State Agency (AF 65). Again the Employer was notified that failure to respond within the 45 days allotted by the regulations would result in loss of the filing date (AF 65).

Finally, on April 8, 1992, the State Agency sent the Employer two additional applicant responses to the Employer's advertisement, with a specified reply date of May 26, 1992 (AF 68). The Employer was again advised that failure to submit to the recruitment report within the 45 days allotted by the regulations would result in loss of the filing date.

The Employer submitted its recruitment report on May 26, 1992 (AF 69-78). The report included the required copy of the posted job notice, the recruitment reports of such posting, and specific reasons for rejection of the three U.S. applicants for the position. The Employer added that "[t]earsheets of advertisement will be sent to your office under separate cover by the employer" (AF 81).

On September 23, 1992, the State Agency notified the Employer that it did not receive the advertisement tearsheets within the 45 days allotted. Accordingly, the Employer's application was cancelled (AF 81).

The Employer responded on October 20, 1992, and requested reconsideration of the notice of cancellation (AF 86). In support of its request, Employer's Counsel submitted that the Employer had, in fact, forwarded the required advertisement tearsheets directly to the State Agency on May 22, 1992. However, "being unaware of the importance of the documentation [Employer] did not send same via certified mail" (AF 86). Along with its request, the Employer resubmitted the advertisement tearsheets, dated March 30, 1992, March 31, 1992, and April 1, 1992 (AF 83-85).

The State Agency received the Employer's response on October 22, 1992. As the Employer 's application was now complete, with all document requirements being met, the State Agency transmitted the application to the U.S. Department of Labor, Certifying Officer for review (AF 88). However, because the Employer was unable to document the timely submission of the advertisement tearsheets, the State Agency did not reinstate the original filing date as requested. Instead, it assigned the Employer a new filing date of October 22, 1992 (AF 87).

The CO reviewed the Employer's application and granted labor certification in a Final Determination dated August 23, 1993 (AF 95). The Final Determination listed the date of acceptance for processing as October 22, 1992 (AF 95).

Responding to the Final Determination, the Employer requested that the CO reconsider the change in the processing date (AF 112-114). In support, the Employer resubmitted the documentation supplied to the State Agency and maintained that any failure to comply with the regulatory requirements amounted to harmless error, and as specified at 20 C.F.R. § 656.21(b)(1), the CO has discretion to grant certification in such instances (AF 113). The Employer stressed that "the penalty of the loss of five years in an unskilled worker case is a tragedy which will effectively prevent legal residence for this client" (AF 114).

The CO responded to the Employer's request for reconsideration of the filing date by advising the Employer that the filing date had been properly cancelled by the State Agency (AF 115-116). Specifically, the CO stated that the harmless error provision cited does not apply to 20 C.F.R. § 656.21(h). Rather, as specifically mentioned in the Technical Assistance Guidelines, where complete information is not received by the local office within 45 days, the application will be returned and, if refiled, will be treated as a new application "with the original date of receipt deleted and replaced with the refiling date" (AF 115).

On September 30, 1993, the Employer requested review by the Board pursuant to 20 C.F.R. § 656.26 (AF 128-129). The CO transmitted a copy of that letter, and select portions of the Appeal File, to the Board under cover letter specifying that the CO does not believe the issue is reviewable (AF 131). By Order dated November 3, 1993, the Board directed the CO to transmit the complete appeal file, and submit a brief as to why the Board lacks jurisdiction in this case. The Employer was granted an additional 30 days to respond (AF 136).

Upon review of the CO's motion to dismiss and accompanying brief, the Board decided, *sua sponte*, to take this issue up *en banc*.

Issues

1. Whether the Board has jurisdiction to review this action; and,

2. What is the proper filing date.

Discussion

Twenty C.F.R. § 656.21(a) provides in relevant part:

> If a labor certification is denied, a request for a review of the denial may be made to the Board of Alien Labor Certification Appeals . . . .

The CO contends that this section only grants the Board jurisdiction to review claims it denies, and not a grant of certification as in this case. We disagree. In this case, the application under the original filing date was effectively "denied" when the local agency determined that the Employer did not timely mail the tearsheets and consequently cancelled the application for refiling. The view that actions other than an "official denial" can effectively be a "denial" for the purposes of determining jurisdiction is not without precedent. This Board has held that a CO's

refusal to process a case involving the substitution of an alien on an approved application was "tantamount to a denial of alien labor certification." *78 Employers*, 92-INA-46 (May 19, 1992).

A finding of jurisdiction over matters which are tantamount to denials is based on a basic premise of appellate jurisdiction and considerable legal precedent.

> While it is the general rule that a party cannot appeal from a judgment in his favor, the rule is not absolute, and where the judgment gives the only part of that which he seeks and denies him the balance, with the result that injustice has been done him, he may appeal from the entire judgment.

Jarvis v. Nobel/Sysco Food Services Co., 985 F.2d 1419, 1424 (10th Cir. 1993), quoting *Automobile Insurance Co. v. Barnes-Manley Wet Wash Laundry Co.*, 168 F.2d 381, 386 (10th Cir.), *cert. denied,* 335 U.S. 859 (1948).

The Supreme Court has also concluded that collateral issues essential to the plaintiff's action are appealable even when a plaintiff has prevailed at a lower level. *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). In that case, the plaintiffs appealed the trial court's denial of their motion for class action certification, after the court had entered judgment for them individually. The Supreme Court found the denial was a procedural issue, collateral to the merits, and appealable because the plaintiff/appellants had a continuing interest in class certification, because of the ability to recover a portion of litigation costs from other class members in a successful class action. *Id.* at 336.

In this case, the actions of the local agency are "tantamount to a denial of alien labor certification" just as in *78 Employers*, *supra*. By determining the tearsheets were not timely mailed, the application was effectively denied, and reapplication was required, causing a five-year loss in the Alien's file priority date. A file priority date of September 14, 1987, would allow processing of the Alien's application to immigrate immediately. A file priority date of October 22, 1992, would be a wait of nine to 18 years or more. See *Amicus Curiae brief from the American Immigration Lawyers Association* at pp. 6-7. The Employer and the Alien would certainly have a continuing interest in the procedural issue of the filing dates, even after the CO approved the Alien's labor certification. See *Deposit Guarantee*, *supra*.

Based on foregoing, we find that the Board has jurisdiction to review this application.

The Employer has submitted a letter dated October 29, 1992, indicating that the tearsheets were mailed on May 12, 1992 (AF 104). The Employer stated that he requested his secretary to mail the tearsheets, and that she informed him that she mailed the documents on May 12, 1992. A copy of a cover letter dated May 12, 1992, to the local agency was provided (AF 103). This mailing would be well within the required 45-day period. The local agency did not inform the Employer that it had not received the documents until September 23, 1992 (AF 81). The other documentation for the Alien's application was sent by Employer's Counsel on May 26, 1992 (AF 69-78). The cover letter of these documents states that the Employer will send the tearsheets "under separate cover" (AF 78). This letter also states that the last U.S. applicant did not show up for her interview on May 12, 1992, and did not telephone to cancel or reschedule (AF 78).

This is the same date that the employer told his secretary to send in the tearsheets, which would be logical as the interview process was complete.

Although the Employer could have used certified mail to insure delivery of the documents, even certified mail did not insure the local agency's proper processing of the Employer's prior documents from 1987. The Employer had no reason to withhold the tearsheets, as those documents show that the Employer complied with the requirements of the Act by placing the job advertisement properly and timely in the New York Post on March 30-31, and April 1, 1992 (AF 83-85). All other documents were provided in a proper and timely fashion, and the Employer moved immediately to acquire and resubmit new tearsheets when informed that the local agency had not received them.

Based on the foregoing, we find that the Employer has proven that the tearsheets were timely submitted and the Alien's application date should be the original filing of September 22, 1987.

Even if the Employer could not prove that he submitted the tearsheets in a timely fashion, there are a number of compelling reasons that the file date be amended to 1987.

First, this Board has held that regulatory deadlines can be tolled in those rare instances where failure to do so would result in manifest injustice. *Madeline S. Bloom*, 88-INA-152 (Oct. 13, 1989) (*en banc*). In this case, the disparity in the priority filing dates would not have been as severe had the local agency not lost the original application. The Employer successfully complied with all other requirements of the Act and successfully obtained labor certification. There was no tactical advantage or other reason for the Employer to withhold the tearsheets, as the advertising had been completed well in advance of the deadline and contained no unduly restrictive requirements or other flaws. The penalty of essentially denying the Alien a chance for immigration, and denying the Employer an employee with necessary and specific skills, goes beyond the scope and purpose of the Act. The Employer has successfully proven that there are not sufficient U.S. workers who are able, willing, qualified, and available for this position, and that employment of the Alien will not adversely affect the wages and working conditions of U.S. workers who are similarly employed. See 20 C.F.R. § 656.50.

Secondly, there is precedent to find grounds for such a tolling of regulatory deadlines. The Supreme Court has held that a court or administrative agency has the discretion to relax or modify procedural rules adopted for the orderly transition of business before it when the ends of justice so require. *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 537-39 (1970).

Finally, this Board has never favored denial of labor certification on purely technical grounds. *H.B.M. Construction/Development Inc.*, 88-INA-539 (January 31, 1990); *J. Michael & Patricia Solar*, 88-INA-6 (April 6, 1989). As stated above, the change in file priority dates is "tantamount to a denial," and the deadlines are procedural or technical issues, collateral to the merits of the case. A finding for the 1992 file priority date would be a denial based on purely technical grounds.

For all of the additional foregoing reasons, the file priority date should be that of the original application of September 14, 1987.

ORDER

The Certifying Officer's grant of labor certification is hereby ordered **AMENDED** to reflect the original filing date of September 14, 1987.

Entered this the _____ day of August, 2002, for the Board:

Richard E. Huddleston
Administrative Law Judge

Judge Guill, joined by Judge Clarke, dissenting:

The Act and implementing regulations authorize this Board to adjudicate denials of permanent labor certification upon the filing of a timely appeal. Here, the majority seeks, by judicial fiat, to assume jurisdiction of a grant of alien labor certification.

To circumvent the dilemma created by the unusual procedural events in this matter, the majority *separates* the two determinations at issue to conclude that the rejection of the first application for failure to submit the requested documentation to the state agency within the 45 day time period allowed, was "tantamount to a denial" over which they find jurisdiction in line with this Board's decision in *78 Employers*. Then, the majority finds that the two applications are inseparable and concludes that the alien, who has been granted labor certification in the second application, should retain the priority date of the first application.

Bootstrapping our jurisdiction to the rejection of the first application is not permitted under the Act or regulations as § 656.26 provides that we only review denials by the certifying officer, not the rejection of an application by the state job service agency. The majority's usurpation of jurisdiction in this regard is overbroad and would permit the "appeal" of any state agency action which may adversely delay an alien's entry into this country.

Moreover, reliance by the majority on *78 Employers* is misplaced. The Board assumed jurisdiction in that case upon concluding that the certifying officer's refusal to process substitution requests prior to the date set forth in the interim regulations was "tantamount to a denial." Similar facts are not present in the record before us today as permanent labor certification was ultimately granted in this case, not denied or rejected. The fact that a change in the priority dates of the alien will have a significant impact on his date of entry into this country is a political question, not a legal one.

Specifically, a change of priority dates, which may result in a delay of nine to eighteen years in the alien's entry into the United States, is not within the scope of review of this Board absent express Congressional authorization which we simply do not have. Congress is most likely aware of the delays commensurate with the labor certification process since it created such delays through the design of the permanent labor certification program and concomitant limitation on the number of alien workers permitted to enter this country under its auspices.

Accordingly, this matter should be dismissed for lack of jurisdiction.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decisions, or **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002.

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition the Board may order briefs.